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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

GUY RICHARD BENNALLACK,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether Petitioner was the subject of a criminal tax investigation under the guise of a civil audit, in violation of the policies and procedures of the Internal Revenue Service, and thus, violating Petitioner's constitutional rights to a due process of law.

2. Whether Petitioner was denied his Constitutional rights as a result of the Prosecutor's failure, or the district court requiring the Prosecutor, to grant immunity to a defense witness.

3. Whether Petitioner was denied a fair trial due to defense counsel not being allowed to examine the Government's informant before the jurors and commenting upon his invocation of the Fifth Amendment, or in the alternative, by the striking of the Government's informant's testimony.

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The Petitioner, GUY RICHARD BENNALLACK, respectfully prays that a writ of certiorari issue to review the Memorandum of the United States Court of Appeals for the Ninth Circuit entered on December 27, 1996.

OPINION BELOW

On December 27, 1996, the Court of Appeals entered its Memorandum sustaining the fifty-one (51) month sentence imposed upon Petitioner following a jury trial to the charges of Conspiracy to Defraud the Internal Revenue Service, in violation of 18 U.S.C. §371; False Statement on a Tax Return, in violation of 26 U.S.C. §7206(1); and Aiding and Assisting in the Preparation and Presentation of a False Tax Return, in violation of 26 U.S.C §7206(2). A copy of the December 27, 1996 Memorandum, which is unreported, is attached as Appendix "A"[1]. Further, on January 16, 1997, the Court of Appeals entered its Order denying the Petition for Rehearing. A copy of the January 16, 1997 Order, which is also unreported, is attached hereto as Appendix "B".

JURISDICTION

On December 27, 1996, the Court of Appeals entered

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[1] No other petitioner is involved in this petition.

its Memorandum sustaining the fifty-one (51) month sentence imposed upon Petitioner following a jury trial to the charges of Conspiracy to Defraud the Internal Revenue Service, in violation of 18 U.S.C. §371; False Statement on a Tax Return, in violation of 26 U.S.C. §7206(1); and Aiding and Assisting in the Preparation and Presentation of a False Tax Return, in violation of 26 U.S.C §7206(2) [App.A]. Jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND PROCEDURAL PROVISIONS INVOLVED

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property without due process of law;...

Internal Revenue Manual Section 4565.21 (set forth in relevant part, in Appendix C).

STATEMENT OF THE CASE

On October 25, 1994, in the District of Nevada, Petitioner, along with Co-Defendant, Lisa Smith, was indicted

by the Grand Jury and charged with Conspiracy to Defraud the Internal Revenue Service, in violation of 18 U.S.C. §371; False Statement on a Tax Return, in violation of 26 U.S.C. §7206(1); and Aiding and Assisting in the Preparation and Presentation of a False Tax Return, in violation of 26 U.S.C §7206(2).

On May 10, 1995, Petitioner filed a Motion to Dismiss the Indictment, or in the alternative, Motion to Suppress Evidence (Government Misconduct). The Government responded to said Motion on or about May 24, 1995. An evidentiary hearing was conducted on May 31, 1995. At the evidentiary hearing, Revenue Agent Craig Anderson ("Anderson") testified that on August 12, 1992, he was provided with a "fax" from an informant, Mark Labertew ("Labertew"), advising, among other things, that Petitioner and/or Cedar Roofing, Inc. ("Cedar Roofing") had over-stated material purchases and incorrectly recorded a bonus (RT 5/31/95). This "fax" was initially received and then provided

to Anderson by the Criminal Investigations Division ("CID"). Shortly thereafter, Anderson on August 18, 1992, spoke with Labertew (RT 5/31/96). The revenue agent testified that he did not turn this matter over to CID because there was no "firm" indication of fraud as the information provided by Labertew could have been "good or not" (RT 5/31/95). Thereafter, said Motion was denied.

A jury trial was commenced on July 10, 1995 and concluded on July 19, 1995 in this matter. At the conclusion of said jury trial, a unanimous verdict of guilty was returned against Petitioner on all counts of the indictment.

REASONS FOR GRANTING THE WRIT

1. **Petitioner was the subject of a Criminal Tax Investigation Under the Guise of a Civil Audit in violation of the policies and procedures of the Internal Revenue Service, and thus, violating Petitioner's constitutional rights to due process of law.**

At the gravamen of this issue is whether Petitioner was the subject of a criminal tax investigation under the guise of a

civil audit. Specifically: (1) whether evidence obtained after August 19, 1992 was done so through the "fraud, trickery and deceit" of the Internal Revenue Agents; (2) whether the evidence was obtained through violations of certain provisions of the Internal Revenue Manual; and, (3) whether the evidence obtained should have been suppressed or the case dismissed.

In the lower court, Petitioner launched a two pronged attack upon the Government's misconduct. The primary thrust of Petitioner's argument in the lower court focused upon the misconduct of Anderson and his supervisor, Mike Taft ("Taft"). Petitioner vigorously asserted that Anderson and Taft violated the doctrine enunciated in **U.S. v. Tweel**, 550 F.2d 297, 299 (5th Cir. 1977). Petitioner's second avenue of attack, that Anderson and Taft, violated IRS policies and procedures by pursuing a criminal investigation under the guise of a civil examination and, thus, violated Petitioner's rights to due process of law.

Such assertions raise important questions regarding the nature of the relationship between the Government and a private citizen.

> Inherent in our democracy is a belief that, since the government represents the will of the people, the people will accept its dictates voluntarily. There is a sense of trust between the government and the people.... [Therefore], a private person has the right to expect that the government, when acting in its own name, will behave honorably. When a government agent presents himself to a private individual, and seeks that individual's cooperation based on his status as a government agent, the individual should be able to rely on the agent's representations. [It is] clearly improper for a government agent to gain access to records which would otherwise be unavailable to him by invoking the private individual's trust in his government, only to betray that trust.

S.E.C. v. ESM Government Securities, Inc., 645 F.2d 310, 316 (5th Cir. 1981) (holding fraud, deceit or trickery are grounds for denying enforcement of an administrative subpoena).

Close scrutiny of the case **sub judice** reveals that

Petitioner established a breach of the above-described trust and this Court should not hesitate to reverse his conviction as a result of said betrayal.

Initially, Anderson was assigned in June, 1992 to audit the corporate income tax return of Cedar Roofing, but only for the fiscal year ending July 31, 1991 (RT 5/31/95, p. 16). Cedar Roofing is a roofing company located in Las Vegas, Nevada. Petitioner was the owner and/or president of Cedar Roofing. However, on August 11, 1992, the "civil audit" transmutation of criminality began. On said date, the CID received a six-page facsimile from an informant, Labertew, a former disgruntled employee who had been hired as Cedar Roofing's in-house accountant (RT 5/31/95, p. 48). On August 12, 1992, the CID Group Manager contacted the civil examination division and advised Taft that an informant, Labertew, had provided a facsimile containing numerous allegations of "false adjustment(s)" regarding Cedar Roofing

(RT 5/31/95, pg. 23, 48). The detailed facsimile alleged, among other things, that $495,000 of non-existent material expenses of Cedar Roofing suppliers (i.e., RESCO Supply, Southern Distributors and Monier Tile) were falsely recorded; a $200,000 "bonus" was improperly paid to Petitioner, $145,000 was paid to an "S-corp" of which Petitioner was a "100%" owner to avoid paying taxes on same; for the past three years, Petitioner was "cashing" Cedar Roofing checks for his personal use and avoiding federal income and state payroll taxes; Petitioner prepared falsified personal financial statements in order to receive a "$2.8 million" loan from First Republic Mortgage Company; and during 1988, 1989 and 1990, Petitioner kept "two-sets of books" at Cedar Roofing to avoid paying $800,000 in taxes. Close scrutiny of the above-mentioned facsimile reveals that it does not merely identify the alleged "false adjustment(s)", but further provides detailed explanations as to the purpose said adjustments were done and

even directs Anderson to documentation to verify same. Having reviewed the facsimile, Anderson, on August 18, 1992, interviewed Labertew regarding same (RT 5/31/96, p. 25).

Then, on August 19, 1992, Taft called Anderson into Taft's office and advised Anderson that Gary Rogers ("Rogers"), Group Manager from CID, had "stopped" by Taft's office and advised him that Rogers was aware of the facsimile received from the informant, Labertew, and told Taft that if Anderson found any "altered or phony" documents to immediately notify CID "so they could do [sic] search warrant" (emphasis in original memo).[2] Anderson was "uncomfortable" with Taft discussing the case with Rogers of CID. Taft advised Anderson that because CID was not "directing" the investigation, it was "okay." Further, they did not know if the

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[2] It is of import to note, Taft testified he could not recall another instance where a group manager of the CID came to the office and advised if they found anything phony or altered to advise him and the CID would get a search warrant to expedite matters (RT 5/31/95, p. 97).

information provided by the informant, Labertew, was "good or not". Anderson was to concede during the evidentiary hearing that the criteria for referring a case to CID was not whether CID was "directing" it, but rather, upon a firm indication of fraud. In fact, Anderson testified that CID should not have any involvement in a civil audit. Petitioner submits Taft's explanation that it was permissible for CID to be involved as long as they were not "directing" the case was merely an artifice. It is inconceivable that a revenue agent (Anderson) and/or his supervisor (Taft) with their many years of experience were not well aware of the criteria set forth in the IRS rules and regulations for referring a matter to CID for tax prosecution. Clearly, Taft's explanation was an attempt to avoid the IRS rules and regulations so as to allow a criminal investigation to be conducted under the guise of a civil audit.

Anderson, fully aware that CID was ready to expedite this case and obtain search warrants as soon as he was able to

verify any discrepancies, interviewed Petitioner and Cedar Roofing's office manager, Lisa Smith ("Smith"), and obtained records from Cedar Roofing and various suppliers. Even though Anderson already had a firm indication of fraud, on October 13, 1992, Anderson interviewed Petitioner. During the course of the interview he asked Petitioner, among other things, whether joint checks signed over by Cedar Roofing through Southern Distributors had ever resulted in Southern Distributors "cutting" a check back to Cedar Roofing. Petitioner denied same, however, Smith stated there were "probably some occasions" where Cedar Roofing had received and deposited checks from Southern Distributors. Anderson specifically asked Petitioner whether Petitioner had ever "personally" received any money from Southern Distributors. Petitioner said that "he had not." Anderson admitted that he had asked this latter question because of the information provided by the informant, Labertew, that Larry Turner,

president of Southern Distributors, had "cut" checks back to Petitioner personally.[3]

Contrary to his protestations, Anderson had obtained and/or reviewed books, records and/or documents which verified the information provided by the informant, Labertew, and had interviewed Petitioner several times by October 2, 1992, giving Petitioner the opportunity to explain away the discrepancies. Notwithstanding, Anderson continued the disguised criminal investigation by then contacting Southern Distributors on October 14 and 15, 1992 to obtain checks. Anderson even contacted Smith on or about October 26, 1992 at which time he advised her that the appointment schedule for

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[3] It should be noted, Southern Distributors was the largest supplier of roofing materials to Cedar Roofing. To ensure Southern Distributors would be paid, because of the amount Cedar Roofing was indebted to Southern Distributors, Petitioner negotiated a system there when Cedar Roofing completed work, the customer would write a joint check payable to Cedar Roofing and Southern Distributors. Petitioner would then endorse the joint check and deliver it to Southern Distributors, who would then deduct the amount owed them and then refund the remainder to Cedar Roofing and/or Petitioner (RT 7/11/95, p. 163-164).

November 2, 1992, had to be rescheduled because something had "come up." Anderson's statement to Smith was a subterfuge as Anderson was actually attempting to obtain check copies from Southern Distributors before he went to the appointment and so he intentionally misled Smith concerning his reasons for rescheduling same.

Then, on November 25, 1992, Anderson and Taft arrived at the office of Petitioner's attorney expecting Petitioner would be there so they could interview him. To their surprise, Petitioner's attorney advised them that they would not have the opportunity to interview Petitioner. In fact, Petitioner's attorney was "insulted" that Anderson and Taft would conclude he was so naive to believe that it was merely a coincidence that Anderson was accompanied by Taft. Petitioner submits that the ulterior motive of having Taft present during Petitioner's interview was to be a witness in the event Petitioner made any incriminating statements. Clearly, the November 25, 1992

interview was another ploy to conduct a disguised criminal investigation and interview Petitioner without advising him of his attendant constitutional rights.

Petitioner submits that the lower court erred in determining that Anderson and Taft did not violate certain guidelines in the Internal Revenue Manual ("IRM"). These guidelines instruct Revenue Agents that they must refer civil cases to CID when a firm indication of fraud is discovered[4] and, more generally, that they must not conduct criminal investigations under the guise of civil audits.[5]

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[4] IRM §4565.21 provides, in pertinent part:

> (1) If, during an examination, an examiner discovers a firm indication of fraud on the part of the taxpayer, the tax return preparer, or both, the examiner shall suspend his/her activities at the earliest opportunity without disclosing to the taxpayer, the taxpayer's representative, or employees, the reason for such suspension....

[5] IRM, §911.83 provides, in part:

> (1) The Tweel case (U.S. v. Tweel, 55[0] F.2d 297 (5th Cir. 1977), very clearly points out that the Service should not attempt to use a civil investigation to develop a criminal

The key issue addressed to this court is whether the cited violations of IRS procedures by the Revenue Agents entitles Petitioner to remedial action. That is, as a general rule, administrative or procedural requirements contained in the manuals of government agencies (including the Internal Revenue Service) do not confer substantive or procedural rights on citizens who come in contact with those agencies. **Groder v. United States**, 816 F.2d 139 (4th Cir. 1987); **United States v. Caldwell**, 820 F.2d 1395 (5th Cir. 1987). However, Petitioner submits that the foregoing general rule is subject to a developing exception - where a provision in a government agency's manual exists for the primary purpose of protecting the Constitutional Rights of a citizen investigated by said agency, due process implications are raised when the agency

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> tax case. If a criminal case is being developed with regard to a taxpayer, the Service must respect the taxpayer's rights and follow Manual instructions pertaining thereto. Therefore, under no circumstances will these procedures be used to develop a criminal tax case under the guise of a civil examination.

violates such provision to the citizen's detriment. **United States v. Tweel**, supra; **United States v. Caceras**, 440 U.S. 741, 745 (1979). **Caceras** holds, in substance that violation of an agency guideline or procedure will not raise a Fifth Amendment due process issue, unless the agency guideline or procedure is aimed at protecting statutory or Constitutional Rights.

In the case at bar, it seems clear that the IRM 9322.11 and 9322.5 (which require the civil agent to suspend examination and make a fraud referral to CID at the first indication of fraud) are aimed at the protection of Constitutional Rights. This conclusion is bolstered by the language in the audit technique handbook for the Internal Revenue Service Agents, quoting from **United States vs. Toussaint**, 456 F. Supp 1069, 1073 (1978):

> The over extension of the examination i.e. by a Revenue Agent before referral to a Special Agent may jeopardize criminal prosecution by giving the taxpayer a basis for claiming that the

> criminal case was substantially built by the Revenue Agent under the guise of making an audit for civil tax purposes.

Further, the Agent's handbook states that a Revenue Agent should gather evidence which will "form the basis for a sound referral" and that "this must be done at the first instance while the books and records are available to the Agent, because, later on, they may not be accessible and information contained therein may be impossible to obtain". See IRM 93.83 (April 8, 1985). Obviously, the purpose and intentions are to protect the rights of the taxpayers as indicated in Special Agents Handbooks IRM 9781 Section 342.132(9). Failure to give taxpayer's the Constitutional warnings prescribed by the Internal Revenue procedures has resulted in the exclusion of evidence obtained from taxpayers.[6]

It is Petitioner's position that Anderson had a firm

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[6] Section 7 affirmatively states a Special Agent will not use trickery, misrepresentation or deception in obtaining evidence or information from the taxpayer.

indication of fraud prior to his referral to CID on or about January 11, 1993. During the critical time period of August 12, 1992 to August 19, 1992, Anderson had sufficient information to refer this matter to CID. However, it was Anderson's testimony that the facsimile from the informant, Labertew, was merely a first, and not firm, indication of fraud. Anderson's testimony is belied by the facsimile itself. Anderson had been provided with such detailed information in the facsimile that such, in and of itself, lent credibility to Labertew's allegation obtained during his interview on August 18, 1992.

Assuming **arguendo**, Anderson wanted to give Petitioner the opportunity to give an explanation regarding same, such had been accomplished by October 2, 1992. There was no excuse to continue the civil audit and not refer it over to CID. Clearly, the interview of October 13, 1992, and then the failed attempt on November 25, 1992, was an

impermissible stratagem to deprive Petitioner of his constitutional right to due process of law. At this earlier time frame, IRS procedures required Anderson to refer this firm indication of fraud to CID. Additional regulations then would have required a special agent (one who does criminal investigations) to become involved and to notify Petitioner at the beginning of an interview that he was under criminal investigation. Because Anderson did not refer the case, and because Petitioner was never notified it was an interview connected with a criminal investigation, on October 13, 1992, Anderson misled Petitioner into believing that the investigation was civil and Petitioner continued to cooperate with that understanding and subsequently made incriminating statements introduced by the Government at trial. Thus, Petitioner's Fifth Amendment due process rights to rely on the IRS regulations were violated.

2. **Petitioner was Denied His Constitutional Rights As a Result of the Prosecutor's failure, or the District Court Requiring the Prosecutor, to Grant Immunity to a Defense Witness**

By way of introduction, Petitioner has argued that his due process right to a fair trial was violated by the Government's failure, or the District Court, **sua sponte**, requiring the prosecutor, to grant use immunity to its own informant, Labertew, which the defense had called as a hostile witness at the time of trial.[7]

Generally, a criminal defendant is not entitled to compel the Government to grant immunity to a witness. The recognized exception to this rule is where the fact-finding process is intentionally distorted by prosecutorial misconduct,

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[7] While it may be true that the district court lacks authority to grant immunity itself under the use immunity statute, 18 U.S.C. §6003(b), the district court had power, on Fifth and Sixth Amendment grounds, to require a grant of immunity if Petitioner's constitutional rights were being violated by the prosecutor's refusal to provide immunity. If a prosecutory abuses his discretion by intentionally attempting to distort the fact-finding process, then a due process violation exists and a court may order the prosecutor to grant immunity or face a judgment of acquittal.

and the defendant is thereby denied a fair trial. See, **U.S. v. Lord**, 711 F.2d 887, 892 (9th Cir. 1983).

In order to make out a claim for prosecutorial misconduct, a defendant must show that the evidence sought from the nonimmunized witness was relevant and that the Government distorted the judicial fact-finding process by denying immunity to the potential witness. See, **Jeffers v. Ricketts**, 832 F.2d 476, 479 (9th Cir. 1987), rev'd on other grounds, 110 S.Ct. 3092 (1990); see also, **U.S. v. Lord**, **supra**, 711 F.2d at 891.

To satisfy the first prong of the **Lord** test, a defendant need not show that the testimony sought was either "clearly exculpatory" or "essential to the defense"; the testimony need only be relevant. See, **U.S. v. Westerdahl**, 943 F.2d 1083, 1086 (9th Cir. 1991); **Jeffers v. Ricketts**, **supra**, 832 F.2d at 479. Labertew's testimony would have undeniably been relevant to Petitioner's defense.

Labertew was an informant for the Government as he assisted the Government in the investigation and/or prosecution of Petitioner by providing them with information, books and records. Further, prior to the trial, the Government made Labertew inaccessible to the defense. In fact, trial counsel argued that the Government was "babysitting" Labertew and had interviewed him numerous times. At the time of trial, Labertew was listed as a Government witness. However, the Government failed to call Labertew in its case-in-chief compelling the defense to call him to testify as a hostile witness. During the course of Labertew's examination by defense counsel, he repeatedly invoked the Fifth Amendment right, not because of concerns of self-incrimination, but rather, on relevancy grounds.

The defense sought to illicit from Labertew his business practices of paying employees in cash. Such was relevant as Petitioner as a defense, relied in part, on the good faith advice

of his accountants, including Labertew. Thus, Labertew's business practices and the advice that he gave Petitioner regarding same, were relevant. Under these circumstances, Petitioner has met the first prong of the **Lord** test.

Many of the cases addressing this issue focused on whether the Government or its agents took affirmative actions to prevent defense witnesses from testifying. See, **Jeffers v. Ricketts**, **supra**, 832 F.2d at 479; see also, **U.S. v. Westerdahl**, **supra**, 945 F.2d at 1086. However, misconduct is not confined solely to situations in which the Government affirmatively induces a witness not to testify in favor of a defendant. Here, the Government obviously was not going to prosecute Labertew as he was their own informant. Failing to grant Labertew immunity had no other purpose other than from to prevent him from giving relevant testimony for the defense. It is curious to note, Labertew was originally listed as a Government witness, but they chose not to call him. A

reasonable inference being Labertew had testimony favorable to Petitioner which the Government did not wish to present.

The key issue in the analysis of defense use immunity is whether the defendant was denied a fair trial. See, e.g., **U.S. v. Lord**, **supra**, 711 F.2d at 892. Petitioner submits that he was denied a fair trial due to prosecutorial misconduct. Because Petitioner has met the two prongs of the **Lord** test, an evidentiary hearing should have been held to determine whether the Government intentionally distorted the fact-finding process. Accordingly, Petitioner's conviction should be reversed and this matter remanded to the District Court to, at the very least, conduct same.

3. **Petitioner was denied a fair trial due to Defense Counsel not being allowed to Examine the Government's Informant Before the Jurors and Commenting Upon His Invocation of the Fifth Amendment, or in the alternative, by the Striking of the Government's Informant's testimony**

The threshold question which must be determined by this Court is whether the Government's informant, Labertew,

"validly" invoked the Fifth Amendment privilege against self-incrimination when called by the defense as a hostile witness. The operative word in the preceding sentence being "validly". Close scrutiny of the record reveals that Labertew improperly invoked the Fifth Amendment privilege not because of self-incrimination concerns, but on relevancy grounds (RT 7/18/95, pg. 97-99).

After a careful review of the record, it reveals that Labertew did not believe that he had committed any crimes and further Labertew did not reasonably believe that the information sought would lead to a criminal prosecution of him (RT 7/18/95, pg. 94-95). See, **U.S. v. Gecas**, 50 F.3d 1549, 1553 (11th Cir. 1993) (witness may invoke the privilege only if he reasonably believe that the information sought could lead to criminal prosecution of him).

In addressing this issue, the Court in **U.S. v. Seifert**, 648 F.2d 558, 560-61 (9th Cir. 1980), citing, U.S. v. Gay, 567

F.2d 916, 920 (9th Cir. 1978) (dictum) (a non-party who testifies can be required to invoke the privilege before the jury) concluded:

> ...that the judge should have allowed counsel to put the question to Saka before the jury. Doing so does not burden Saka's privilege. He is not on trial, and his invoking the privilege is not being used against him. If he were later indicted and tried, he invocation of the privilege could not be used against him. Nor would his invocation of the privilege be the sort of major event, to which the jury might give undue weight, that the complete refusal of a witness to testify might be.

Further, in **U.S. v. Kaplan**, 832 F.2d 676, 684-85 (1st Cir. 1987), the Court, citing **U.S. v. Seifert**, **supra**, stated:

> In Seifert, the Ninth Circuit confronted the issue before us and ratified similar questioning by drawing an analogy to the Caminetti v. U.S., 242 U.S. 470, 37 U.S. 192, 61 L.Ed. 442 (1917). Caminetti held that when a defendant voluntarily takes the stand and then refuses to testify on cross-examination (as to matters raised on direct) he can be impeached by letting the jury draw adverse inferences from his silence.
>
> We agree with the Seifert court. We hold that the district court's refusal to force Alan Brown

> to assert his fifth amendment privilege before the jury was error. None of the permissible reasons for circumscribing the scope of a criminal defendant's constitutional right to cross-examination -- harassment, prejudice, confusion, repetitiveness, marginal relevant, for example -- warranted such a ruling.

It must be remembered, Labertew had been hired by Cedar Roofing to clean up certain problems, including, but not limited to, those problems which involved paying employees in cash.[8] During the examination of Labertew, defense counsel questioned Labertew about his business practices. It was certainly relevant to inquire into Labertew's business practice of continuing to pay employees in cash. Clearly, this inquiry went to Labertew's credibility. Petitioner relied, in part, on a

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[8] When Petitioner hired Labertew as Cedar Roofing's in-house accountant in early 1992, Cedar Roofing had numerous accounting problems and Petitioner hired Labertew to set up a "complete" accounting system (RT 7/18/95, p. 31). It was Labertew who put everything together for the 1991 tax returns and provided Cedar Roofing's accountant, Garth Zenger with all the information (RT 7/18/95, p. 32). Labertew put together the loan packages and financial statements required by the banks in order to obtain a loan (RT 7/18/95, p. 41), and discussed with Zenger the $200,000 "bonus" to Petitioner (RT 7/12/95 p. 187).

defense of good faith advise of his accountants, including Labertew. Thus, Labertew's business practices, both current and past, could be used as a method of impeachment by attacking Labertew's credibility.

However, to compound the error, the District Court then struck Labertew's testimony. It must be observed that striking a witness' entire testimony is an extreme sanction, not to be lightly imposed. See, **Lawson v. Murray**, 837 F.2d 653, 656 (4th Cir.), cert. denied, 488 U.S. 831, 109 S.Ct. 87 (1988) (striking the testimony of a witness is a drastic remedy [which] is not to be lightly done). In finding error in the lower court's striking of Labertew's testimony, this Court need only apply the well-established rule set forth in **U.S. v. Lord**, **supra**, 711 F.2d at 892, that a court:

> may apply this sanction only when the question asked pertains to matter directly affecting the witness's testimony; the judge may not use the sanction when the privileged answer pertains to a collateral matter.

See also, **U.S. v. Negrete-Gonzales**, 966 F.2d 1277, 1280 (9th Cir. 1992.

Since Labertew's testimony related to collateral matters, such as credibility, the danger of prejudice was considerably less and thus, the district court erred in striking his testimony. See, **U.S. v. Duran**, 884 F.Supp. 573, 576 (D.D.C. 1976).

CONCLUSION

For the foregoing reasons, Petitioner respectfully submits that the Petition for Writ of Certiorari should be granted.

Respectfully submitted this 15th day of April, 1997.

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NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 95-10532
	)	
Plaintiff-Appellee	)	
	)	D.C. No.
v.	)	CR-95-00267-1-PMP
	)	
GUY RICHARD BENNALLACK,	)	**MEMORANDUM**[1]
	)	
Defendant-Appellant	)	(Filed
	)	December 27, 1996)

Appeal from the United States District Court
for the District of Nevada
Philip M. Pro, District Judge, Presiding

Argued and Submitted November 4, 1996
San Francisco, California

Before: FLETCHER, FARRIS, AND HALL, Circuit Judges

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[1] This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir.R. 36-3.

Defendant-appellant Guy Richard Bennallack appeals from his convictions and sentencing on thirteen counts relating to defrauding the government through false tax returns. We have jurisdiction, 28 U.S.C.§1291, 18 U.S.C. §3742[2]

I. GATHERING OF EVIDENCE

Appellant argues for the exclusion of evidence allegedly gathered in violation of IRS policy. Absent"unusual circumstances, the exclusionary rule does not apply when IRS agents violate internal regulations." United States v. Snowadzki, 723 F.2d 1427, 1430-31 (9th Cir. 1984). Here, however, there was no violation of internal regulations or of appellant's rights.

Labertew's information was only a first indication of fraud, which does not warrant transfer to the Criminal

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[2] Section 3742 does not, however, confer jurisdiction on this court to hear appellant's challenge to the district court's discretionary refusal to depart downward from the sentencing guidelines; we therefore dismiss that part of his appeal. See infra, Part V.G.

Investigation Division ("CID"). See, Internal Rev. Manual, §4565.21. The district court was not erroneous in determining that there was no firm indication of fraud until January, 1993, when Anderson failed to receive adequate explanations in response to documentation provided in December, 1992. IRS policy dictates that at a suspicion of fraud, examiners "should endeavor to ask the taxpayer, the preparer, the representative, or any other involved party for an explanation of the 'discrepancies' which are the basis of the examiner's suspicion of fraud and any other questions which will resolve the question of the taxpayer's intent." Id. This is precisely the type of investigation Anderson undertook with regard to his questioning of Bennallack, Smith, Southern Distributors, and Labertew. The investigation comported with IRS policy.

Moreover, appellant's Fourth Amendment rights were not violated. There is no evidence that CID was involved in agent Anderson's investigation prior to January, 1993, and

appellant was therefore was not deceived as to the investigation's nature. See U.S. v. Tweel, 550 F.2d 297, 299 (5th Cir. 1977). Appellant has not met his burden of showing that the investigator engaged in "sneaky deliberate deception" or that he affirmatively and intentionally misled the defendant as to the nature of the investigation. See, Id. The district court correctly denied defendant's motion to dismiss the indictment or, in the alternative, to suppress evidence.

II. USE IMMUNITY

Next, appellant argues that he was denied Fifth and Sixth Amendment rights because the prosecutor did not offer to grant use immunity to Labertew, a defense witness. Appellant has no Sixth Amendment right to demand use immunity for a witness who invokes his privilege against self-incrimination. U.S. v. Baker, 10 F.3d 1374, 1414 (9th Cir. 1993). Moreover, his due process rights are not violated absent proof of prosecutorial misconduct. United States v. Montoya, 945

F.2d 1068, 1078 (9th Cir. 1991).

The prosecution's behavior here does not warrant an exception to this rule. The prosecution did not examine the witness, and therefore did not induce him to invoke his Fifth Amendment privilege. See Id. At 1078. Moreover, the prosecution did not intentionally distort the fact-finding process by granting immunity to a witness whose testimony Labertew would directly contradict. See United States v. Westerdahl, 945 F.2d 1083, 1087 (9th Cir. 1991). The prosecution did not violate appellant's rights by not volunteering to grant use immunity to defendant's witness.

Moreover, defendant did not request at trial that the prosecution grant Labertew immunity, but now raises for the first time on appeal the contention that the government should have granted immunity sua sponte. Thus, even if the prosecution's behavior amounted to error that could have been corrected upon timely objection by defense counsel, it does not

warrant reversal because any error did not affect substantial rights or result in a miscarriage of justice. See U.S. v. Young, 470 U.S. 1, 15 (1984).

III. LIMITING SCOPE OF EXAMINATION

We undertake a two part inquiry to determine whether there was in fact error and, if so, if that error was harmless. See Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986).

Here, the district court committed no error by limiting the scope of the defense examination. The Sixth Amendment "does not empower a defendant to pursue irrelevant inquiries or exercise complete control" over the examination of a witness. U.S. v. Brown, 936 F.2d 1042, 1048 (9th Cir. 1991). A defendant may not call witnesses "for the sole purpose of compelling them to invoke their Fifth Amendment privilege in front of the jury." U.S. v. Licavoli, 604 F.2d 613, 624 (9th Cir. 1979).

Here, the judge disallowed questioning only into

subjects which the witness had asserted his Fifth Amendment privilege not to answer; defendant was free to question Labertew as to all other relevant matters. Because the defense was only prohibited from inquiries which it knew the witness would not answer, it was not denied the opportunity to expose the jury to facts from which jurors "could appropriately draw inferences." Van Arsdall, 475 U.S. at 680. The district court's limitation was not error.

In any event, any error here is subject to harmless error analysis. Id. at 680. The defense sought only to elicit testimony to impeach Labertew's credibility. However, the prosecution choose to examine him on any point relating to Bennallack. Because Labertew gave no harmful testimony, impeachment would not have mattered. Even assuming that "the damaging potential of the cross-examination were realized," the limitation of examination was harmless beyond a reasonable doubt. Id. at 684.

IV. SUFFICIENCY OF THE EVIDENCE

Appellant argues that there was no proof of the requisite intent for each of the crimes of which he was convicted. We address each crime in turn.

A. Intent required under 18 U.S.C. §371

Conspiring the defraud the United States in violation of 18 U.S.C. §371 requires the wrongs to be done by deceit, craft, trickery, or dishonesty. U.S. v. Caldwell, 989 F.2d 1056, 1058 (9th Cir. 1993).

Here, there was evidence that appellant maintained two sets of books in order to hide cash transactions; paid portions of wages with checks in order to appear legitimate; structured cash transactions to avoid Currency Transaction Reports; and had corporate checks endorsed with false names. There was sufficient evidence for a jury to find beyond a reasonable doubt that defendant acted with deceit, craft, trickery, or dishonesty.

B. Intent Required under 26 U.S.C. §7206(1)

Filing a false tax return, proscribed by 26 U.S.C. §7206(1), requires that "the defendant falsely subscribed to the return, statement, or other document willfully, with the specific intent to violate the law." U.S. v. Marabelles, 724 F.2d 1374, 1380 (9th Cir. 1984) (citation omitted). Because direct evidence of specific wrongful intent is "rarely available, willfulness may be inferred by the trier of fact from all the facts and circumstances." Id. at 1379. There need not be evidence rising to the level of defendant's intent to evade taxes, so long as there is evidence sufficient to infer an intent to violate the law by underreporting. Id. at 1380.

Here, there was evidence that, on several occasions, appellant told witnesses that he paid cash wages to avoid taxes. Moreover, he kept two sets of books and destroyed relevant documents after he learned of the pending IRS investigation. Thus, there was sufficient evidence to infer an intent to violate

the law. See Id.

C. Intent required under 26 U.S.C. §7206(2)

Here, the government must prove defendants acts with specific intent to defraud the government in the enforcement of its tax laws. U.S. v. Salerno, 902 F.2d 1429, 1432 (9th Cir. 1990) (citations omitted). Knowledge that one's action will result in a false return, coupled with motive to avoid the payment of taxes, or a benefit inuring to the defendant is sufficient. See Id. at 1433 (summarizing cases upheld under §7206(2)).

Here, in addition to the evidence discussed above, there was evidence that appellant knew that paying employees in cash would result in their false reporting of taxes, and that appellant would benefit from such underreporting. This evidence is sufficient for a jury to find intent to defraud the government in enforcement of its tax laws.

V. APPLICATION OF THE SENTENCING GUIDELINES

Finally, appellant argues that, for several reasons, the sentencing court erred in applying the sentencing guidelines. We address each argument in turn.

A. Base Offense Level

The district court correctly determined appellant's base level offense of 16. The court heard three days of evidence regarding the amount of the tax loss and based its factual findings on the computations of both the government's expert and of the Department of Probation. Appellant's only support for its challenge is its bare contention that its expert's calculations are more accurate than those relied on by the district court. Appellant points to no specific error in the district court's factual findings, and we find no clear error.

B. Sophisticated Means

Sophisticated means includes conduct that is "more complex or demonstrates greater intricacy or planning than a

routine tax-evasion case." U.S.S.G. §2T1.4, comment. n.3 Appellant's challenge rests on his assertion that he was not sophisticated in his knowledge of tax laws. The jury necessarily rejected this argument with its guilty convictions. Here, appellant created false documentation to hid his illegal conduct; provided false W-2 forms to his employees for them to prepare false returns; used Southern Distributors to issue the checks in amounts less than $10,000; maintained two sets of books in order to conceal sales; withheld information from his tax advisors in order to falsify his returns; withheld invoices from the IRS. Appellant's convictions, coupled with the overwhelming evidence, belie appellant's claim that he was not sophisticated in his means. The district court's findings here were not clearly erroneous, and its application of the guidelines in this regard was correct.

C. Substantial portion of income derived from pattern or scheme

Appellant argues that the income derived from the criminal pattern or scheme was not a "substantial" portion of his income because he received more income from other investments. The district court noted that the guidelines do not define "substantial," but that the 16 counts of appellant's conviction support a finding that a significant amount of Cedar Roofing's income derived from appellant's scheme. Appellant's source of business income was Cedar Roofing. Accordingly, the court concurred with the Department of Probation's recommendation that a two-level increase was appropriate here. Appellant points to nothing erroneous in the court's findings, and this court dins no clear error. The two-level increase was appropriate.

D. Appellant's Roles as Organizer or Leader

Here, the district court was not clearly erroneous in

finding that Bennallack had decision making authority; that Bennallack in fact made decisions to pay workers in cash; that appellant, as 100% shareholder in Cedar, benefitted the most from the scheme; and that appellant was the organized of the criminal conduct. The district court correctly used these facts in applying the guidelines and determining a two-level enhancement. See U.S.S.G. §3B1.1, comment. n.4.

E. Obstruction of Justice

Shredding documents relevant to an official investigation is a sufficient basis for this enhancement. U.S.S.G. §3C1.1, comment. n.3(d). It matters not that appellant did not actually shred the documents, so long as he ordered them to be shredded. The record is clear that the district court based this enhancement on the testimony of Kelly Casey, who testified that Cedar employees began shredding older records after the current investigation began. The district court's findings here are supported by testimony, and not

clearly erroneous. The enhancement for obstruction of justice will stand.

F. Acceptance of Responsibility

The guidelines apply only to a defendant who "clearly demonstrates acceptance of responsibility." U.S.S.G. §3E1.1(a). This discretionary decrease it not intended to apply to "a defendant who puts the government to its burden of proof at trial by denying the essential factual elements of guilt, is convicted, and only then admits guilt and expresses remorse." Id., comment. n.2. Conduct resulting in an enhancement under §3C1.1 for obstruction of justice "ordinarily indicates that the defendant has not accepted responsibility for his criminal conduct." Id. comment. n.4. The sentencing judge is "in a unique position to evaluate a defendant's acceptance of responsibility" and is "entitled to great deference on review." Id., comment., n.5.

Here, the district court found that appellant obstructed

justice by ordering the shredding of relevant documents, and found appellant's testimony as to his intent patently incredible. These factual determinations were not clearly erroneous and are entitled to deference on review. The district court correctly denied appellant's request for a downward departure.

G. Downward Departure for Other Factors

Appellant does not claim that the guidelines specifically mandate downward departure for these other factors, but rather challenges the district court's discretionary decision not to depart downward. This court lacks jurisdiction to hear this claim, as the district court's "discretionary refusal to depart downward is not reviewable on appeal." U.S. v. Morales, 898 F.2d 99, 101 (9th Cir. 1990). The appeal on this ground is therefore dismissed.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	No. 95-10532
	)	
Plaintiff-Appellee	)	
	)	D.C. No.
v.	)	CR-95-00267-1-PMP
	)	
GUY RICHARD BENNALLACK,	)	**ORDER**
	)	
Defendant-Appellant	)	(Filed
	)	January 16, 1997)

Before: FLETCHER, FARRIS, AND HALL, Circuit Judges

Having been reviewed by the court, appellant's petition for reharing is DENIED.

Section 4565.21 of the Internal Revenue Manual states, in pertinent part:

> If during an examination, an examiner discovers a firm indication of fraud on the part of the taxpayer,. . .the examiner shall suspend his/her activities at the earliest opportunity without disclosing to the taxpayer, the taxpayer's representative, or employees, the reason for such suspension. . .A firm indication of fraud must be distinguished from a first indication of fraud. A first indication of fraud can be described as a mere suspicion of fraud. Examiners are legally permitted, and should endeavor to ask the taxpayer, the preparer, the representative, or any other involved party for an explanation of the "discrepancies" which are the basis of the examiner's suspicion of fraud and any other question(s) which will resolve the question of the taxpayer's intent. The determination of firm indication of fraud is a factual determination which can only be determined on a case by case basis.